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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/780,273
Filing Date: February 09, 2001
Appellant(s): FROSETH ET AL.

Everett Diederiks, Jr.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 12, 2008 appealing from the Office action mailed April 14, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

NEW GROUND(S) OF REJECTION

It is noted that the Office Action, mailed April 14, 2008, on page 6, paragraph 6, the rejection of claims 135, 138, 145 and 146 under 35 U.S.C. 103(a) inadvertently omitted the rejection of claims 137 and 139. Claims 137 and 139 recite the same

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limitations as claim 134 and in the Office Action, mailed April 14, 2008, the rejection of claims 135, 138, 145 and 146 was unpatentable for the reasons given under the rejection which also rejected claim 134. Therefore, claims 137 and 139 are rejected for the reasons given with respect to claim 134. Claims 137 and 139, however, were inadvertently excluded from the rejection heading. In any case, the new ground of rejection is as follows:

1. Claims 135, 137-139, 145 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266) in view of Katz (US 3851574), Google Groups and Daedkindt et al. (EP 335852), Belleson et al. (US 4751090) GoogleGroups (6/16/1999), GoogleGroups (01/21/2000), GoogleGroups(01/2/2000), GoogleGroups (01/19/2001) and International Food Information Council (IFIC - 1998).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

GB 2250266	EZZAT	6-1992
US 3851574	KATZ	12-1974
US 6618062	BROWN	12-1999
US 6358546	BEBIAK et al.	1-1999
EP 335852	DAEDKINDT et al.	10-1989

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US 4751090

BELLESON et al.

6-1988

GoogleGroups (12/8/1999), Newsgroups: alt.support.diet.low-carb, "make your own LC gift baskets."

GoogleGroups (6/16/1999) Newsgroup: misc.health.diabetes; Re: Artificial Sweetener you can bake with?"

GoogleGroups(1/21/2000) Newsgroup: alt.support.diet.low-carb; "Re: Can Sucralose be caramelized?"

GoogleGroups (1/22/2000) Newsgroup: alt.support.diet.low-carb; "Re: Can Sucralose be caramelized?"

GoogleGroups (1/19/2001), Newsgroup: misc.health.diabetes; "Re: sugar alcohol?"

International Food Information Council (IFIC), "Everything You Need to Know About Sucralose," May 1998, <http://www.ific.org/publications/brochures/sucralosebroch.cfm>, pages 1-4

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 128, 134 and 144 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266) in view of Katz (US 3851574), GoogleGroups (12/8/1999), Daedkindt et al. (EP 335852), Belleson et al. (US 4751090) GoogleGroups (6/16/1999), GoogleGroups (01/21/2000), GoogleGroups(01/22/2000), GoogleGroups (01/19/2001) and International Food Information Council (IFIC - 1998), Brown et al. (US 6618062) and Bebiak et al. (US 6358546),

Regarding claim 128, Ezzat teaches unpopped popcorn kernels, a flavoring ingredient, an additive and a microwave package which are selected by the consumer

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which requires further finishing by the consumer in order to pop the popcorn with microwaves (See page 1, line 33 to page 2, line 23). Claims 128, 135 and 138 differ specifically reciting using sucralose as the particular sweetening additive.

Nevertheless, Katz has been relied on to teach using sweeteners in combination with alternative sweeteners that have an equivalent sweetness to sucrose for the purpose of coating the unpopped kernels with a sweetening carbohydrate film former (column 3, lines 23-35 and column 3, line 66 to column 4, line 9). Google Groups teaches that sucralose has been a known sweetener used to flavor popcorn (see Page 3 of 7). Also, Google Groups teaches alternative sweeteners used for dietary purposes such as for low calorie diets. Daedkindt et al. also teaches that sucralose has been a known alternative sweetener which has been used for reduced calorie diets (See English Abstract). Therefore, Daedkindt et al., GoogleGroups and Katz teach that it has been well known to combine alternative sweeteners for the purpose of flavoring popcorn products and for diet conscious consumers. Therefore, to specifically use sucralose would have been an obvious matter of choice for the purpose of achieving a particular flavor to the food product. Additionally, Belleson et al. has been relied on to teach a sugar phase comprising a plurality of sweetening components (column 2, lines 39-41), wherein microwaving until a burned flavor has been reached is minimized (column 3, lines 3-34 and lines 51-54). IFIC teach how much sucralose should be substituted for sucrose in a cooking application, while GoogleGroups (06/16/1999), GoogleGroups (1/21/2000), GoogleGroups (01/22/2000) and GoogleGroups (01/19/2001) teach that sucralose does not caramelize like conventional sugar, thus overcoming the burning

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taste of microwave popcorn composition caused by caramelization of sugar. Therefore, based on these teachings there would have been a reasonable expectation of success of using sucralose in packaged unpopped microwave popcorn kernels which prevented the burning of the sugar.

Claim 128 further differs from the combination of the prior art in reciting wherein the food product is a customized food product wherein the ingredients are selected by the consumer. As noted in the Examiner's Answer, mailed on August 9, 2007 and in the Final Rejection, mailed August 15, 2006, since the prior art is marketing packaged flavored unpopped popcorn kernels, by selecting a particular brand or a particular flavor or selecting a packaged product with the particular desired ingredients, the consumer is selecting a customized food product. As taught by Google Groups, for instance, it has been well known in the art to use alternative sweeteners for dietary purposes. Therefore to choose a packaged popcorn product that includes an alternative sweetener as opposed to sugar reads on ingredients selected by the consumer. After the consumer would select the package, the consumer would have to microwave or further finish the food prior to eating.

In any case, Brown et al. has been relied on to teach allowing consumers to customize a food product over the Internet from vendors to maximize customer satisfaction and to allow customers to customize a food product based on dietary requirements (Column 1, line 15 to Column 2, line 40). Bebiak et al. teach the conventionality of customizing prepackaged food products for the purpose of tailoring a

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packaged product to correspond to particular dietary requirements (Column 1, lines 39-62, column 2, line 56 to column 3, line 5).

Therefore, it would have been obvious to modify the method of Ezzat to allow the consumer to customize the product using the internet prior to enclosing the popcorn snack, because Brown et al. teach having a customer to customize a food product via the Internet would assure that the vendor would maximize a customer's satisfaction and allow the customer to customize based on individual dietary requirements. Bebiak et al. additionally teaches that it has been conventional to customize pre-packaged food products via the Internet to meet individual dietary requirements

Claim 134 differs from the prior art combination in specifically reciting where the food product further comprises Acesulfame K, in addition to sucralose.

The combination discussed above teaches using sugar substitutes. Daekindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose and acesulfame K has the same sweetening power as saccharose per unit volume, but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (See English Abstract, Page 2).

Therefore, Daekindt et al. teach that it has been conventional to combine sucralose and acesulfame K for the purpose of achieving a particular sweetness while also accommodating a reduced calorie diets by using a sweetener that has a reduced caloric value. Therefore it would have been obvious to further modify Ezzat and include acesulfame K since Daenkindt et al. teach that sucralose and acesulfame K provides, in

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combination, the same sweetness per unit volume of saccharose, at a reduced calorie level.

Regarding claim 144, Ezzat teaches using salt (page 2, line 7) and Katz also teaches using a sweetener as well as salt (See Example 1, Caramel Corn on column 5).

Claims 135, 137-139, 145 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266) in view of Katz (US 3851574), Google Groups and Daedkindt et al. (EP 335852), Belleson et al. (US 4751090) GoogleGroups (6/16/1999), GoogleGroups (01/21/2000), GoogleGroups(01/2/2000), GoogleGroups (01/19/2001) and International Food Information Council (IFIC - 1998), for the reasons given with respect to the rejection of claims 128, 134 and 144 above.

Claims 137 and 129 recite wherein the popcorn snack further comprises acesulfame K. These claims are rejected for the reasons given above with respect to claim 134. Claims 135 and 138 only differ from claim 128 in the exclusion of any recitation of a customization of the package by having the consumer select the food ingredient, flavoring, additive and package.

(10) Response to Argument

- On page 9 of the Brief, Appellants urge that

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“Importantly, sugar substitutes, such as sucralose, are chemically distinct from natural sugars, and may such sweeteners cannot be utilized in the same manner as sugar. This is particularly significant when the cookign method utilized is microwave heating....The effect of microwave on food additives can be vastly different that the effect of a conventional cooking method on the same additives. For example, aspartame is thermally unstable under microwave conditions and is unsuitable as a sugar substitute in microwave cooking.”

These arguments have been considered but are not deemed persuasive. Firstly, it is not clear as to why microwave cooking cannot be considered a conventional cooking method. It is noted that Appellant has not provided any clear and convincing evidence substantiating the assertion regarding unsuitability of microwave cooking with sugar substitutes, and this was also urged in response to the Appeal Brief filed, February 7, 2007.

Appellant also provides an example of aspartame, which appears to be thermally unstable under microwave conditions. It is noted that aspartame has not been claimed. It is further unclear as to what is considered “thermal instability.” This could read on the transition between solid to liquid. This language is not clear. In addition, even if Appellant’s assertion was true, it is not clear from Appellant’s specification, as to how Appellant overcomes these disadvantages of using alternative sweeteners. It is further noted that Appellant does not appear to recognize these disadvantages in the specification but rather only states that sucralose and acesulfame K can be used as sweeteners. Only on page 21, line 4 does Appellant mention sucralose and only on page 8, line 25 does Appellant mention acesulfame K. Nowhere in the specification does Appellant appear mention the instability or unstable characteristics of these additives. The concept of burning is only referred with respect to the finished product

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on page 16, lines 4-7, with respect to the difference between “puffing” and “reheating” in that reheating can result in burning, scorching and/or charring of the pieces.

- On page 10 of the Brief, Appellants urge

“However, Katz et al. does not teach or suggest the use of sugar substitutes for microwave popcorn, or even just sugar substitutes. In fact, Katz is particularly limited to the use of sucralose or dextrose syrups (see column 3, lines 23-35). It is respectfully submitted to be totally misleading on the part of the Examiner to state that Katz broadly teaches using alternative sweeteners with sucrose on unpopped popcorn when the Katz disclosure is specifically limited to sucrose and dextrose.”

This argument has been considered but is not deemed persuasive. It is noted that Katz et al. teach on column 3, lines 23-35 teach alternative sweeteners other than sucrose, such as high and low dextrose syrups. Further on column 3, lines 46-52, Katz et al. teaches other carbohydrates (sweeteners) can be used such as dried malt syrup and enzyme converted dried barley malt extract. Even further on column 3, lines 54-66, Katz et al. teaches that if more sweetness is desired it can be provided by sugar containing sweeteners such as maltose containing syrups, higher dextrose equivalent cereal starch hydrolysates, galactose, honey and the like. Therefore, Katz et al. is replete with examples of sweeteners incorporated in the packaged unpopped popcorn, other than simply sucrose.

- Further on page 10 of the Brief, Appellants urge

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“There is simply no teaching provided by Ezzat, Katz et al., GoogleGroups (12/8/1999) and/or the IFIC reference to utilize Splenda® in a packaged, uncooked or unpopped popcorn product. The Examiner appears to be arguing that sucralose and sugar are equivalents.”

This argument has been considered but is not deemed persuasive. It is noted that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In this case, GoogleGroups (12/8/1999) has only been relied on to teach that sucralose has been a known sweetener used to flavor popcorn. Similarly, Daenkindt has also been relied on to teach that sucralose has been a known alternative sweetener which has been used for reduced calorie diets. In combination with the teachings of Katz et al., wherein combinations of sweeteners other than sucrose can be employed in packaged unpopped popcorn kernels, it would have been obvious to one having ordinary skill in the art to combine alternative sweeteners for the purpose of flavoring popcorn product and for diet conscious consumers. The art taken as a whole teaches that alternative sweeteners such as sucralose are appealing to consumers desiring low calorie diets. Therefore, to specifically use sucralose would have been an obvious matter of choice for the purpose of achieving a particular flavor to the food, while also appealing to diet conscious consumers, such as those that desire low calorie foods. It is noted that sucralose and sugar were not considered equivalent but rather that sucralose was an alternative sweetener to sugar. Sugar and sucralose, however, can be considered equivalents if the equivalence has been based on the ability to

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impart a sweet flavor to a food product. In addition, it is noted that even Belleson et al. teaches using a sugar phase in packaged microwave popcorn, wherein sweeteners other than sugar can be used (column 2, lines 3-10), such as any mono, di or trisaccharides which possess crystalline solid and are soluble in water and possess a sweet taste. Therefore, to specifically use sucralose would have been an obvious matter of choice for the purpose of achieving a particular flavor to the food, while also appealing to diet conscious consumers, such as those that desire low calorie foods.

- Further on page 10 of the Brief, Appellants urge that

“The IFIC reference does not reference microwave cooking, which is significantly different from conventional cooking techniques, such as baking which is the type of cooking specifically discussed in IFIC.”

This argument has been considered but is not deemed persuasive. It is noted that although IFIC teaches baking, IFIC further teaches on page 2 of 4 that sucralose “can be used virtually like sugar without losing any of its sugar-like sweetness, even in applications that require prolonged exposure to high temperatures. The products made with sucralose maintain their sweetness during cooking and baking.” It is noted that cooking encompasses more than just conventional baking and Appellant's arguments are not clear as to why microwave cooking cannot be considered “conventional cooking.” Furthermore, it is noted that IFIC thus broadly teaches employing sucralose in cooking applications, or prior to the heating of the product for preparing. By placing a microwave package comprising unpopped popcorn kernels in a microwave, one would

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also have been cooking the unpopped kernels. GoogleGroups (1/21/2000) teaches that sucralose does not caramelize, thus teaching its tolerance of heat. This property of sucralose is further evidenced by GoogleGroups (1/19/2001) on the last paragraph regarding sucralose. Furthermore, it has been well established in the art that food products such as baked goods can also be prepared in a microwave. Therefore appellants arguments regarding cooking in a microwave with sucralose versus cooking with sucralose using "conventional cooking techniques" is not persuasive.

Additionally, appellants have not provided any clear and convincing evidence of the instability that occurs as a result of employing sucralose in microwave applications and even if this is true, appellants have not provided any disclosure for how this disadvantage has also been overcome in appellants' invention.

- On page 11 of the Brief, Appellants urge that,

"Sugar and sugar substitutes have different chemical structures and can react in vastly differently ways when processed, consumed and/or heated. This fact is actually evidenced by GoogleGroups (1/21/2000), which clearly states that Splenda® is not a direct substitute for sugar and 'Splenda doesn't remotely resemble sugar in structure.' Therefore, not only is there certainly no suggestion in Ezzat as to the desirability of using a sugar substitute for any purpose and the GoogleGroups (12/8/1999) reference is actually seen to teach away from applying sucralose to popcorn prior to popping of the popcorn, GoogleGroups (1/21/2000) evidences that sucralose is not a direct substitute for sugar."

These arguments have been considered but are not deemed persuasive. Sugar and sugar substitutes such as Splenda® (i.e. sucralose) do indeed have different

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chemical structures. This does not mean that there is no suggestion to use sugar substitutes for any purpose. In view of the art taken as a whole, Katz et al. clearly teaches employing sweeteners other than sugar. GoogleGroups (12/8/1999) and Daenkindt teach that sucralose has been an alternative sweetener employed in foods, which thus appeals for its low calorie dietetic advantages. Appellant's assertion that GoogleGroups (1/21/2000) is not a direct substitute for sugar is not convincing, since GoogleGroups (1/21/2000) has only been relied on to address appellant's arguments regarding the thermal instability. Since sucralose would not caramelize, there would have been a reasonable expectation that browning and thus burning of the glaze at the temperatures to which the popcorn of the combination was exposed would not have resulted in the thermal instability. It is noted that Appellants have not provided any clear and convincing evidence that the claimed thermal instability using alternative sweeteners would occur. The reference to Belleson et al. has only been relied on as an additional teaching that burning of sugars during microwave preparation of unpopped popcorn kernels was known and wherein popcorn is covered with a sweetened glaze which is not caramelized (column 3, lines 51-54). Since GoogleGroups (1/21/2000) teaches that sucralose will not caramelize and since Belleson et al. teaches preventing caramelization of the sweetened glaze when microwave popping popcorn kernels, it would have been obvious to have employed sucralose since it would not caramelize and further for its dietetic advantages. In addition, even if it were assumed that sucralose could have caramelized or burned, once this phenomenon was known to occur with sweeteners used for microwave popcorn products, it would have been

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obvious to employ techniques to prevent this from occurring, as evidenced by Belleson et al. In any case, it is noted that IFIC teaches that sucralose can clearly be used for cooking applications, while GoogleGroups (06/16/1999), GoogleGroups (1/21/2000), GoogleGroups (01/22/2000) and GoogleGroups (01/19/2001) teach that sucralose does not caramelize like conventional sugar, thus teaching that the burning taste of microwave popcorn composition caused by caramelization of sugar can be overcome. As discussed above, IFIC broadly teaches employing sucralose in cooking applications, or prior to the heating of the product for preparing and GoogleGroups (1/21/2000) teaches that sucralose does not caramelize, thus teaching its tolerance of heat. This property of sucralose is further evidenced by GoogleGroups (1/19/2001) on the last paragraph, regarding sucralose. Therefore, based on these teachings there would have been a reasonable expectation of success of using sucralose in packaged unpopped microwave popcorn kernels which prevented the burning of the sugar.

In addition, it is noted that if these presumed disadvantages are present in employing sucralose, appellant has not provided any clear and convincing evidence as to how appellant has also overcome these apparent disadvantages of employing alternative sweeteners such as sucralose or acesulfame K. Appellant's specification only states that sucralose and acesulfame K can be employed but has not recognized any of the disadvantages to employing these alternative sweeteners.

- On page 12 of the Brief, Appellants urge

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“The fact that sucralose does not caramelize when desired during candy making or baking does not lead one to the conclusion that sucralose would be a desirable replacement for sugar in microwave popcorn products.”

This argument has been considered but is not deemed persuasive. It is noted that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208

USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As discussed above, the art taken as a whole already teaches that sucralose has been a conventional substitute sweetening ingredient for sugar. GoogleGroups (1/21/2000) has only been relied on to teach that sucralose would not caramelize.

Since Belleson et al. also teach preventing caramelization of the sweetening agent during microwave cooking of unpopped popcorn kernels, to employ sucralose which also won't caramelize would therefore have been obvious to one having ordinary skill in the art. Appellants rely on the urging that since sugar and sucralose are chemically different that one would not lead to the conclusion to use sucralose as a replacement for sugar. It is noted that there can be several different factors for what ingredients can substitute each other. In this case, the art taken as a whole clearly teaches that sucralose as the replacement for sugar has been based on the flavor imparted by sucralose, which is similar to sugar, with the added advantage of reduced caloric intake.

- On page 13 of the Brief, Appellants urge that

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“Ezzat discusses a sealed bag containing corn kernels and spices which are popped to form classic popcorn. On page 5 of the Office Action, the Examiner asserts that the product in Ezzat is customized simply because ‘the prior art is marketing as a packaged flavored unpopped popcorn kernels, by selecting a particular brand or a particular flavor or selecting a packaged product with the particular desired ingredients, the consumer is selecting a customized product.’ This interpretation ignores the plain meaning of the claims, particularly when they are properly read in light of the specification. There is simply no teaching or suggestion in Ezzat, either taken alone or in combination, for a consumer to establish a customized food product by choosing popcorn as a food ingredient, a flavoring, sucralose as an additive and a microwave package, when the popcorn must be popped with microwaves while sucralose is heated as required by claims 128 and 144.”

These arguments have been considered but are not deemed persuasive. It is noted that by selecting a product comprising the packaging and ingredients the consumer would indeed be selecting a package that is customized to one's preferences. For instance, if a consumer had a choice between two packages of unpopped microwave popcorn kernels where one package had a cheese flavoring when popped, while the other had a sweet flavor when popped, and the consumer found cheese unappealing but found sweet flavors desirable by choosing the sweet flavored unpopped popcorn kernel package, the consumer would indeed be selecting a product customized to his or her preferences and would be selecting the package and ingredients associated therewith. It is noted that the claims have been given their broadest reasonable interpretation. In any case, to even further address appellant's urgings, Brown et al. was relied on to teach allowing consumers to customize a food product over the Internet from vendors to maximize customer satisfaction and to allow customers to customize a food product based on dietary requirements (Column 1, line 15 to Column 2, line 40). Bebiak et al. was further relied on to teach the conventionality of customizing

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prepackaged food products for the purpose of tailoring a packaged product to correspond to particular dietary requirements (Column 1, lines 39-62, column 2, line 56 to column 3, line 5). Therefore, the art taken as a whole teaches that the process of allowing the consumer to selectively choose the aspects of the food package has been a conventional process. Once it was known to allow a consumer to selectively choose components of the food package, the particular food package to be customized would have been an obvious matter of choice and/or design.

- On page 15 of the Brief, Appellants urge

“Daenkindt et al. simply teaches a powder including a plurality of sweeteners, including aspartame, which, as the Applicant has already pointed out and the Examiner not disputed, has been found to be thermally unstable under microwave conditions. Therefore, employing a reference to aspartame, a non-microwave usable sugar substitute, would certainly not provide a reasonable teaching to employ sucralose on a product to be microwave.”

These arguments have been considered but are not deemed persuasive. It is noted that by teaching that acesulfame K can be combined with sucralose and saccharose has the same sweetening power as saccharose alone but also provides the advantage of reduced caloric value (see English Abstract, page 2). Even if Daenkindt et al. teach a powder including a plurality of sweeteners, it is noted that this powder clearly is edible and would have been used for sweetening edible products. Therefore, the art teaches that it has been conventional to combine acesulfame K and sucralose for the purpose of achieving a particular sweetness while also accommodating reduced calorie diets. It

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would therefore have been obvious to one having ordinary skill in the art to combine acesulfame K and sucralose for the purpose of achieving a desired level of sweetness while also reducing the caloric intake of the sweetener. Regarding appellants' urging that the Examiner has not disputed that a plurality of sweeteners including aspartame are found to be thermally unstable, it is noted that appellants have not provided any evidence of how this would also have been overcome in the appellants' invention. Appellants have also not provided any clear and convincing evidence of the assertion regarding the instability of the sweeteners when employed with microwave treatment. It is noted, however, that in the Examiner's Answer to the Appeal Brief, filed February 7, 2007, the examiner did indeed state that no clear and convincing evidence has been provided regarding the thermal instability of microwave heating of the sugar substitute, aspartame. It is further noted that the claims are directed to acesulfame K and not aspartame.

- On page 16 of the Brief, Appellants provide similar arguments with respect to claims 135 and 145 as those presented for claims 128, 134 and 144. Appellants arguments are not persuasive for the reasons given above in response to appellant's arguments on pages 9-15 of the Brief..
- On page 18 of the response, Appellants urge that the Examiner failed to properly address claim 137 in the Office Action and for the purposes of the

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appeal, the Appellant assumes that the Examiner intended to argue claim 137 under this section.

The examiner appreciates Appellant's consideration of the limitations of claims 137. It is noted that the limitations of claim 137 is the same as claim 134, wherein the package further includes acesulfame K. The claim is rejected for the reasons given with respect to claim 134 and Daedkindt et al. has been relied on to teach a sweetener that combines both sucralose and acesulfame K, which as equal sweetness to saccharose, alone but with less calories. Appellants arguments with respect to claim 137 are similar to those discussed on page 15, regarding claim 134. These arguments are not persuasive for the reasons give above with respect to Appellants arguments on page 15.

- On page 19 of the Brief, Appellants provide similar arguments with respect to claims 138 and 146 as those presented for claims 128, 134 and 144. Appellants arguments are not persuasive for the reasons given above in response to Appellants arguments on pages 9-15.
- On page 20 of the response, Appellants urge that the Examiner failed to properly address claim 139 in the Office Action and for the purposes of the appeal, the Appellant assumes that the Examiner intended to argue claim 139 under this section.

The examiner appreciates Appellant's consideration of the limitations of claims 139. It is noted that the limitations of claim 139 is the same as claim 134, wherein the package further includes acesulfame K. The claim is rejected for the reasons given with respect to claim 134 and Daedkindt et al. has been relied on to teach a sweetener that combines both sucralose and acesulfame K, which as equal sweetness to saccharose, alone but with less calories. Appellants arguments with respect to claim 137 are similar to those discussed on page 15, regarding claim 134. These arguments are not persuasive for the reasons give above with respect to Appellants arguments on page 15.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) Reopen prosecution. Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be

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relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/V. T./

Examiner, Art Unit 1794

Art Unit: 1794

Conferees:

/Steve Weinstein/

Primary Examiner, Art Unit 1794

/Gregory L Mills/

Supervisory Patent Examiner, Art Unit 1700

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/Gregory L Mills/

Supervisory Patent Examiner, Art Unit 1700